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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 42137 & 43590
Plaintiff-Respondent,)	
)	ADA COUNTY NOS.
)	CR 2013-2622 & CR 2013-7755
v.)	
)	
JAE HO JUNG,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

In consolidated cases, a jury found Jae Ho Jung guilty of two counts of possession of a synthetic cannabinoid with the intent to deliver, guilty of one count of possession of drug paraphernalia with the intent to deliver, and failed to reach a verdict on another count of possession of drug paraphernalia with the intent to deliver.¹

¹ Mr. Jung's original Notice of Appeal contained only one of the district court case numbers – CR-2013-2622. (Supreme Court docket number 42137). Since filing his Appellant's Brief in docket number 42137, Mr. Jung has filed a Notice of Appeal timely from an amended judgment of conviction entered in the present case. (R. 43590, pp. 169-180.) This Court has entered an order consolidating the appeals allowing Mr. Jung to file a separate Appellant's Brief in docket number 43590, at which point the State will be allowed to file a Respondent's Brief addressing claims raised in both Appellant's Briefs. See Order Consolidating Appeals, filed October 8, 2015.

Mr. Jung asserts that the district court abused its discretion by failing to act consistently with the applicable law, when the court denied Mr. Jung's request for a withheld judgment.

Statement of Facts and Course of Proceedings

Acting on information from patrol and bicycle officers suggesting that synthetic cannabinoids were being sold in the Jay Mart, a gas station and convenience store located at 16th and State Street in Boise, Detective Andreoli of the Boise Police Department went undercover in an attempt to purchase some but he was told by the clerk that the Jay Mart does not sell those substances. (Tr. Trial, p.243, L.17 – p.245, L.4.)² Presumably due to a lack of probable cause to obtain a search warrant, Detective Andreoli contacted detectives with the Idaho State Police Alcohol Beverage Control who agreed to do a premises check purportedly to ensure that the Jay Mart was complying with regulations regarding the sale of alcohol. (Tr. Trial, p.246, L.24 – p.247, L.11.) On October 25, 2012, law enforcement personnel searched the Jay Mart, found 15 packets labeled “Holy Grail” potpourri which contained synthetic cannabinoids, found pipes, grinders, and other drug paraphernalia, and detained the owner, Jae Jung. (Tr. Trial, p.331, L.9 – p.332, L.7; p.341, L.5 – p.361, L.2.) Detective Andreoli asked Mr. Jung, a lawful permanent resident born in South Korea (PSI, pp.6-7)³, about the synthetic cannabinoids – Mr. Jung responded, in a thick accent, that a white male had dropped

² The bulk of the trial proceedings are contained in the 1,033 page transcript created for docket number 42137 and will be cited as “Tr. Trial” in this Brief.

³ Citations to materials contained in the Presentence Investigation Report, which was created for the appeal in docket number 42137, will include the page numbers associated with the electronic file containing those materials.

them off about a week earlier asking him to hand them out as samples, but he had not sold or given any away. (Tr. Trial, p.453, L.18 – p.455, L.7.) Officers seized the synthetic cannabinoids and some items they considered to be drug paraphernalia and Detective Andreoli told Mr. Jung that the items he had were illegal to sell, but they did not arrest him at that time. (Tr. Trial, p.455, L.8 – p.457, L.18; p.563, L.16 – p.565, L.1.)

Although a warrant was issued for Mr. Jung's arrest on February 26, 2013, he was not arrested until four months later when informants told detectives that Mr. Jung was selling synthetic cannabinoids in the Jay Mart. (R. 42137, pp.11-13; PSI, p.83.) Detectives again entered the Jay Mart, found more pipes and other purported drug paraphernalia being sold, arrested Mr. Jung, and found 8 packets of synthetic cannabinoids labeled "Krooked Original" on Mr. Jung's person and within popcorn and hot dog bags. (Tr. Trial, p.462, L.5 – p.505, L.21.) After being made aware of his right to remain silent, Mr. Jung voluntarily spoke with Detective Andreoli and answered every question asked of him. (Tr. Trial, p.506, L.22 – p.519, L.24; Exs. 17, 18.) Mr. Jung stated that a man who called himself "Noah" delivered the synthetic cannabinoids to him, describing him as tall and skinny and always wearing glasses. (Ex. 18.) "Noah" told him that selling the "fake marijuana" was legal in Idaho because selling real marijuana was legal in Washington and Colorado, and that other stores around Boise sold the same products. (Ex. 18.) Mr. Jung admitted, however, that he did not sell the synthetic cannabinoids out in the open, only sold it to people he trusted, and did not tell his employees that he was selling the product because he was "scared." (Ex. 18.) Mr. Jung told Detective Andreoli how much he bought the product for, how much he sold it for, and how often he sold it. (Ex. 18.) Mr. Jung was shown a picture of an

individual and asked if it was “Noah”; however, Mr. Jung was unable to say one way or the other whether the person pictured was the person he knew as “Noah.” (Ex. 18.)

The jury found Mr. Jung guilty of both possession of a synthetic cannabinoid with the intent to deliver and possession of paraphernalia with the intent to deliver, stemming from his arrest on April 25, 2013. (R. 43590, p.92.)⁴ During the sentencing hearing, counsel for Mr. Jung requested that the court withhold judgment and place Mr. Jung on probation. (Tr. Sent, p.29, L.17 – p.30, L.4.) The district court indicated that it believed that Mr. Jung meets two of the requirements necessary for the court to withhold judgment pursuant to I.C. § 37-2738(4) – that he had no prior finding of guilt to any drug related crimes, and the court had an abiding conviction that he will successfully complete the terms of his probation; however, the court felt that it “cannot find that the defendant meets criteria (c), that the defendant satisfactorily cooperated with law enforcement authorities in the prosecution of drug related crimes of which the defendant had previously been involved.” (Tr. Sent, p.30, L.11 – p.31, L.6; p.33, L.19 – p.34, L.22.) The district court sentenced Mr. Jung to concurrent suspended terms of six years, with two and one-half years fixed for possession of synthetic cannabinoids with the intent to deliver, and five years, with three years fixed, for possession of paraphernalia with the intent to deliver, and placed Mr. Jung on probation for a period of five years. (R. 43590, pp.156-163, 169-177.)⁵ Mr. Jung filed a timely Notice of Appeal

⁴ The jury also found Mr. Jung guilty of possession of a synthetic cannabinoid with the intent to deliver related to his possession of “Holy Grail” on October 25, 2012, but the jury could not reach a verdict related to the charge of possession of drug paraphernalia with the intent to deliver on that same date. (R. 42137, p.180.)

⁵ In docket number 42137, the district court sentenced Mr. Jung to a concurrent suspended unified term of five years, with two years fixed, and placed Mr. Jung on probation for a period of five years. (R. 42137, pp.187-194.)

from his Amended Judgment of Conviction in case number 43590. (R. 43590, pp.169-180.)

ISSUE

Did the district court abuse its discretion by failing to enter a withheld judgment?

ARGUMENT

The District Court Abused Its Discretion By Failing To Enter A Withheld Judgment

Sentencing decisions are reviewed on appeal under an abuse of discretion standard. When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989). Mr. Jung asserts that the district court's decision to deny his request for a withheld judgment was based upon a faulty understanding of the applicable legal standards.

Idaho Code § 37-2738 reads, in relevant part, as follows,

(1) Any person who pleads guilty to, is found guilty of or has a judgment of conviction entered upon a violation of the provisions of subsection (a), (b), (c) or (e) of section 37-2732, Idaho Code, shall be sentenced according to the criteria set forth herein.

. . .

(4) When sentencing an individual for the crimes enumerated in section (1) of this section, the court shall not enter a withheld judgment unless it finds by a preponderance of the evidence that:

(a) The defendant has no prior finding of guilt for any felony, any violation of chapter 80, title 18, Idaho Code, or subsection (a),(b), (c) or (e) of section 37-2732, Idaho Code, whatsoever; and

(b) The sentencing court has an abiding conviction that the defendant will successfully complete the terms of probation; and

(c) The defendant has satisfactorily cooperated with law enforcement authorities in the prosecution of drug related crimes of which the defendant has previously had involvement.

I.C. § 37-2738. The jury found Mr. Jung was guilty of violating I.C. § 37-2732(a) by possessing a non-narcotic schedule I controlled substance (synthetic cannabinoid) with the intent to deliver. Therefore, in order to be eligible for a withheld judgment, all three of the criteria enumerated in I.C. § 37-2738(4) must be met.

The district court correctly found that Mr. Jung had no prior convictions for any of the offenses listed in subsection (a); in fact, Mr. Jung had no prior criminal history whatsoever. (Tr. Sent, p.30, Ls.7-19; PSI, pp.5-6.) Furthermore, the district court's finding that it had an "abiding conviction that the defendant will successfully complete the terms of his probation" is well supported. (Tr. Sent, p.30, Ls.20-22.) Mr. Jung repeatedly apologized for his behavior and expressed nothing more than a desire to stay in the United States so that his wife could continue get the best possible treatment for her cancer, and that his two sons (the younger of whom is an American citizen) would be able to continue to grow up in the only country they knew. (Tr. Sent, p.32, L.15 – p.33, L.2; Ex. 18, PSI, pp.6-9, 13-16.) The court's finding is further supported by the fifteen different letters submitted in support of Mr. Jung by people attesting to his character, including the fact that he often times would allow homeless people to come into his store just to get warm during the freezing winter months, and that he would provide those in need with free food and drink. (PSI, pp.115-129.)

Mr. Jung asserts that the district court abused its discretion by failing to find that he met the third criteria. The court appeared concerned that there was a lack of a factual basis for the court to conclude that Mr. Jung “has satisfactorily cooperated with law enforcement authorities in the prosecution of drug related crimes of which the defendant has previously had involvement.” (Tr. Sent, p.30, L.22 – p.31, L.6; p.34, Ls.8-16 (quoting I.C. § 37-2738(4)(c)).) It is not entirely clear whether the district court felt that there was no factual basis to conclude that Mr. Jung cooperated with law enforcement in the present case, or whether the court felt that Mr. Jung had to have previously been involved in drug related crimes for which he satisfactorily cooperated in the prosecution of. In either case, the district court abused its discretion.

The Idaho Legislature has provided instructions on how to interpret laws it has enacted.

(1) The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent.

(2) If a statute is capable of more than one (1) conflicting construction, the reasonableness of the proposed interpretations shall be considered, and the statute must be construed as a whole. Interpretations which would render the statute a nullity, or which would lead to absurd results, are disfavored.

(3) Words and phrases are construed according to the context and the approved usage of the language, but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition.

I.C. § 73-113. Mr. Jung asserts that I.C. § 37-2738(4)(c) is capable of more than one conflicting interpretation: 1) that the defendant’s ability to get a withheld judgment

depends upon the defendant having prior involvement in drug related crimes for which he satisfactorily cooperated in the prosecution of; 2) that the cooperation requirement applies only where law enforcement first asks the defendant to cooperate, i.e. that this provision will not bar a defendant from obtaining a withheld judgment unless law enforcement first asks the defendant to cooperate; or 3) that the cooperation requirement applies to the investigation leading to the charge brought in the case for which the defendant is being sentenced.

The first of these interpretations would lead to absurd results. If a defendant's eligibility to obtain a withheld judgment depends upon having prior involvement in drug related crimes, a defendant who simply had no such prior involvement would not be eligible for a withheld judgment and would suffer more draconian, rather than more lenient treatment. Idaho law, however, recognizes that the first offender should be granted more lenient treatment than those individuals who have engaged in repeated criminal activities. See *State v. Hoskins*, 131 Idaho 670, 673 (1998). Additionally, reading this provision to require the defendant to cooperate with law enforcement leaves a defendant's ability to obtain a withheld judgment to the discretion of law enforcement, i.e., if the police choose not to ask the defendant to cooperate, the defendant would have no ability to meet this provision. Such a reading, however, would allow the executive branch to, in effect, exercise the power reserved only to the legislature to limit the inherent power of a sentencing court to exercise sentencing discretion. See *State v. Branson*, 128 Idaho 790 (1996). Thus, to the extent that the district court read I.C. § 37-2738(4)(c) as allowing for a withheld judgment only where a defendant had a prior history of drug related crimes, law enforcement asked the

defendant to cooperate in the prosecution of such crimes, and the defendant satisfactorily met this obligation, the district court's reading is incorrect and the court abused its discretion in denying Mr. Jung a withheld judgment by failing to apply the applicable legal standards.

Mr. Jung asserts that the most reasonable interpretation of I.C. § 37-2738(4)(c) is one that recognizes that the defendant must first be given an opportunity to cooperate with law enforcement in the prosecution of drug-related crimes in which the defendant has been involved. In other words, where defendants like Mr. Jung have no prior involvement in drug related crimes, or where defendants with prior involvement in drug related crimes are never asked to cooperate in any prosecution related to those crimes, this provision would automatically be met. Such an interpretation is consistent with the axiom that first time offenders should be granted more lenient treatment than those who repeatedly violate the law, and that a court's authority to exercise sentencing discretion is not limited by the whims of narcotics detectives.

Finally, to the extent that this Court determines that I.C. § 37-2738(4)(c) requires a defendant to cooperate with law enforcement in the case for which the defendant is being sentenced in order to be eligible for a withheld judgment, Mr. Jung met that requirement in the present case. Simply put, Mr. Jung answered every question that law enforcement ever asked of him. He identified his source by name and gave a physical description, and he identified how the transactions occurred including how much he paid for the synthetic cannabinoids, how much he sold it for, and how often he sold it. (Ex. 18.) He was shown a picture of someone who Detective Andreoli presumably suspected may have been "Noah" but he was unable to identify the person

because “Noah” always wore sunglasses, and because of the inherent problems of cross-cultural identification.⁶ (Ex. 18.) Law enforcement did not ask him to become a confidential informant or otherwise cooperate in the prosecution of anyone else. Therefore, Mr. Jung met the all of the requirements set forth in I.C. § 37-2738(4)(c), and the district court abused its discretion by failing to grant his request for a withheld judgment.

CONCLUSION

Mr. Jung respectfully requests that this Court vacate his judgment of conviction and remand his case to the district court with instructions that the court withhold judgment while Mr. Jung serves his probationary term.

DATED this 31st day of March, 2016.

/s/ _____
JASON C. PINTLER
Deputy State Appellate Public Defender

⁶ Mr. Jung told Detective Andreoli that when he first approached him, Mr. Jung actually thought that Detective Andreoli was “Noah” and he also stated that white people look the same to him, which is not unexpected. See *State v. Almaraz*, 154 Idaho 584, 594 n.8 (2011) (citing *State v. Henderson*, 208 N.J. 208, 27 A.3d 872, 907 (2011)).

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of March, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JAE HO JUNG
5538 SOUTH FLAX PLACE
BOISE ID 83716

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DELIVERED VIA EMAIL

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